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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JUSTIN ANTHONY NYLANDER,

Plaintiff and Respondent,

v.

ROSS EASTMAN,

Defendant and Appellant.

E070814

(Super.Ct.No. MCC1700597)

OPINION

APPEAL from the Superior Court of Riverside County. Angel M. Bermudez,
Judge. Affirmed.

Cal-Lawyer and Daniel J. Tripathi for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Plaintiff and respondent Justin Anthony Nylander (Husband) sued Christiana
Frances Eastman Weiss (Wife) and defendant and respondent Ross Eastman (Brother)
for (1) defamation per se; (2) false light; and (3) intentional infliction of emotional

distress. Brother filed an anti-SLAPP motion. (Code Civ. Proc., § 425.16.)¹ The trial court denied Brother's anti-SLAPP motion. Brother contends the trial court erred by denying his anti-SLAPP motion. We affirm the order.

FACTUAL AND PROCEDURAL HISTORY

A. COMPLAINT

The facts in this subsection are taken from Husband's complaint. Brother is Wife's brother. Husband, Wife, and Brother have known one another for over 30 years. Husband and Wife divorced in 2014. Husband and Wife shared four children, two of whom were minors and two of whom were adults. Husband and Wife had an ongoing custody dispute concerning their two minor children.

In December 2015, in the family court proceedings, Husband requested an order modifying child custody. On February 29, 2016, Wife filed a responsive declaration in which she and Brother declared Husband was "a sexual abuser, child molester, and pedophile."

On May 29 and 30, Brother sent Husband threatening messages via Facebook. In the messages, Brother wrote, " 'Now I'm coming to cut your fuckin' throat! Guarantee that, you pathetic pedophile faggot!!' " Husband alleged that Wife and Brother "spread malicious lies" to Husband's friends about Husband being a pedophile. Husband has not been "charged with or convicted of sexual abuse, child molestation, or pedophilia."

¹ All subsequent statutory references will be to the Code of Civil Procedure unless otherwise indicated.

Husband's first cause of action was for defamation per se. In the cause of action, Husband faulted Brother for telling their mutual friends that Husband was a pedophile. Also within the cause of action, Husband wrote, "While the statements made in the Responsive Declaration by [Wife] and [Brother] may fall under the scope of the 'litigation privilege,' the defamatory statements [Wife and Brother] have made to third-parties that have nothing to do with the Custody Case, lie far beyond the scope of the privilege."

Husband's second cause of action was for false light. Husband alleged that Brother portrayed him in a false light when he told third parties that Husband was a pedophile. Husband's third cause of action was for intentional infliction of emotional distress. Husband asserted that the conduct alleged in the complaint was "malicious and oppressive."

B. ANTI-SLAPP MOTION

Brother filed an anti-SLAPP motion. (§ 425.16.) Brother asserted, "The entire complaint is based on communicative acts by [Wife and Brother]." Brother cited the rule that statements made in a judicial proceeding are a protected activity. (§ 425.16, subd. (e)(1).) Brother concluded, "Here, all of the allegations by [Husband] flow from communicative acts related to litigation by [Wife and Brother]. Thus, the complaint is subject to this motion to strike."

C. OPPOSITION

Husband opposed the anti-SLAPP motion. Husband asserted his lawsuit arose from statements made outside of the family court proceedings. Husband wrote, "The

facts, as pled in the Complaint, demonstrate that while [Husband] understands that statements made in the courtroom are privileged, the republication of those same statements outside the courtroom are not. [Citation.] [Brother] waived the privilege when he made those same statements outside of the courtroom and to nonparticipants in the family law custody litigation.”

Husband asserted that Brother failed to discuss the second-prong of the anti-SLAPP analysis, i.e., Husband’s probability of prevailing on the merits. Husband contended he had a probability of prevailing on the merits because “[H]usband can easily call the third-party witnesses at trial to testify when and where they heard [Brother] call [Husband] a pedophile . . . outside of the courtroom proceedings. [¶] . . . [¶] These statements are also patently false. For one, [Husband] has never been charged with or convicted of sexual abuse, child molestation, or pedophilia.”

D. REPLY

Brother replied to Husband’s opposition. Brother contended “this action is a classic SLAPP suit, and [Wife and Brother] deserve the protections of the anti-SLAPP statute designed to protect individuals who are asked to participate in litigation by testifying.” Brother contended the lawsuit arose from the statements that he made in the family court proceedings. Brother then contended his statements about Husband being a pedophile were a public issue because “child molestation is . . . a public issue” and the law requires certain professions to report child molestation allegations. Brother asserted Husband mixed allegations of protected and unprotected activities in his complaint.

Brother asserted Husband failed to establish a probability of prevailing on the merits because Husband failed to provide evidence in support of his opposition. Brother asserted the litigation privilege protected Brother from Husband's lawsuit.

E. HEARING

The trial court issued a tentative ruling denying the anti-SLAPP motion and held a hearing on the motion. Brother argued that Husband's lawsuit arose from Brother's statements in the family court proceedings because in the complaint Husband asserted the allegations revolved around the dispute in family court. Therefore, Brother reasoned the lawsuit arose from Brother's protected activity.

Husband explained that the complaint mentioned the family court proceedings to provide context and background. Husband asserted that the complaint was drafted to focus on Brother's out-of-court statements to "the friends, to the peers, to the adult children."

The trial court said, "It's not a well-crafted Complaint. That's problem number one. Because it's not a well-crafted Complaint, it's not immediately identifiable if the statements are being broadcast within or without the courtroom. [¶] So when you have the motion to strike, then, it's not [*sic*] incumbent upon the person that's moving to strike to show where those statements are being made and to then present admissible evidence—usually in the form of a declaration—by somebody that will say, 'This is what I have heard and is where I've heard it outside the courtroom setting.' [¶] They did neither of those things, so I have a poorly crafted Complaint that leads to some

ambiguity, and then I have a motion that's deficient on its face. . . . [T]hat's why the motion is denied."

DISCUSSION

A. LAW AND STANDARD OF REVIEW

"The anti-SLAPP statute does not insulate defendants from *any* liability for claims arising from the protected rights of petition or speech. It only provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity. Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success. [Our high court has] described this second step as a 'summary-judgment-like procedure.' " (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384-385.) We apply the de novo standard of review. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.)

B. PROTECTED ACTIVITY

1. *LAW*

We examine whether Husband's complaint concerns a protected activity. A protected activity includes "any written or oral statement or writing made before a . . . judicial proceeding" or "any . . . oral statement . . . made in a place open to the public or a public forum in connection with an issue of public interest." (§ 425.16, subd. (e)(1)&(3).) "[A] moving party may rely on the plaintiff's allegations alone in making

the showing necessary under prong one without submitting supporting evidence.” (*Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924, 936.)

2. CONCESSION

In his complaint, Husband alleged that Brother lied about Husband being a pedophile in “[Wife’s] February 29, 2016 Responsive Declaration to Request for Order.” Husband alleged that Brother lied “to alienate and greatly diminish [*sic*] [Husband’s] chances of losing custody rights of his minor children.”

Also in the complaint Husband asserted, “While it is true that an absolute ‘litigation privilege exists in judicial proceedings in the State of California, these false allegations have clearly spread beyond the four walls of the courtroom by way of [Wife and Brother]. The only parties with knowledge of the false allegations made against [Husband] in the Responsive Declaration should have been [Wife and Brother] and [Husband]. It is now clear that these false allegations about [Husband] have spread throughout [Wife’s, Brother’s, and Husband’s] peer group.”

The foregoing allegations reflect a concession by Husband that the litigation privilege will protect Brother from liability associated with the alleged falsehoods in the responsive declaration. Husband explains, in the complaint, that Brother’s falsehoods have affected Husband’s life beyond the custody proceedings. Thus, in reading the complaint as a whole, it includes the information about the alleged lies in the custody proceedings as background information—so the reader understands Brother’s possible motivation for initially generating the falsehoods. In other words, the allegations regarding the alleged lies in the responsive declaration are not a basis of liability; those

allegations are merely background information. The allegations in the complaint that concern Brother's liability are those related to alleged falsehoods and threats outside of the custody proceedings.

Further in the complaint, Husband explicitly addresses Brother's motivation. Husband alleges, "[Wife's and Brother's] intent in repeatedly making the defamatory statements about [Husband] to countless third-parties is abundantly clear. [Wife and Brother] have disparaged and damaged [Husband's] reputation at every possible turn out of spite, in an effort to curry favor with the Parties' friends and children, and to attempt to prejudice the court in the Custody Case against [Husband]." Thus, Husband assigns two motives to Brother (1) to ruin Husband's family and social life outside of the custody proceedings; and (2) to assist Wife in the custody case.

Also within the complaint, Husband made a second concession regarding the litigation privilege. Husband wrote, "[Wife's and Brother's] communications to these third-parties were not privileged. While the statements made in the Responsive Declaration by [Wife and Brother] may fall under the scope of the 'litigation privilege,' the defamatory statements [Wife and Brother] have made to third-parties that have nothing to do with the Custody Case, lie far beyond the scope of the privilege."

Thus, Husband twice conceded that the litigation privilege would protect Brother's statements and writings within the custody proceedings. Husband explained that his lawsuit concerned Brother's alleged out-of-court threats and falsehoods. Accordingly, Husband's lawsuit does not arise from Brother's statements made in a judicial proceeding. (§ 425.16, subd. (e)(1).)

3. *THREAT*

Husband alleged that, via Facebook messenger, Brother threatened to kill Husband. Because the threat was allegedly delivered via a private internet message, it does not appear that it (1) was made during a judicial proceeding (§ 425.16, subd. (e)(1)); or (2) was made in a public place or public forum (§ 425.16, subd. (e)(3)). Therefore, the threat is not a protected activity.

4. *RUMORS*

In his complaint, Husband alleged, “Kristine Viola . . . has known [Husband and Wife] since middle school. Ms. Viola felt compelled to step forward on [Husband’s] behalf because she ‘heard a rumor about [Husband] being a pedophile from a mutual friend, and [she] believe[d] that it ha[d] traveled to others as well. [¶] [Wife and Brother] have a clear and undeniable pattern of casually spouting these defamatory statements with utter disregard for the truth and how it affects [Husband’s] well-being.”

The foregoing allegations reflect that Brother’s alleged false statements were made “casually” and that Viola heard the pedophile rumor “from a mutual friend.” The inference from the allegation is that Brother told the alleged pedophile lie to Viola’s friend; however, it is unclear to whom exactly Brother spoke or wrote. Because it is unclear to whom, when, where, and under what circumstances Brother allegedly made the false statement, it cannot be determined from the complaint if Brother engaged in a protected activity.

Brother failed to provide declarations or other evidence to assist the court in determining whether he was engaged in a protected activity when he allegedly told

friends that Husband was a pedophile. (See *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1418-1420 [court considered defendant's evidence to determine whether vague complaint arose from protected activity].) In sum, because it is unclear when, where, to whom, and under what circumstances Brother allegedly made the false statement(s), the trial court did not err by denying the anti-SLAPP motion.

DISPOSITION

The order is affirmed. Appellant is to bear his own costs on appeal.² (Cal. Rules of Court, rule 8.278(a)(5).)

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MILLER

Acting P. J.

We concur:

SLOUGH

J.

RAPHAEL

J.

² Justin Anthony Nylander did not appear in this court as a respondent. Therefore, we do not enter an award of costs in his favor. (Cal. Rules of Court, rule 8.278(a)(5).)